No. 76-414

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD KILCULLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1976. The petition for a writ of certiorari was filed on September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's charge to the jury was erroneous and, if so, whether the charge constituted plain error affecting petitioner's substantial rights.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted

of transporting falsely made, forged or counterfeited checks in interstate commerce, in violation of 18 U.S.C. 2314 and 2, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed in an unpublished opinion (Pet. App.).

The evidence at trial, as summarized by the court of appeals (Pet. App. 2-9), showed that the charges against petitioner stemmed from the transportation between Boston, Massachusetts, and New York, New York, of two checks, each in the amount of $97,500, that were purportedly drawn by Charles Brennick, a Massachusetts businessman, and endorsed in blank by the payee, Jacob Weiner. In fact, the check forms were counterfeit, Brennick's signature had been forged and the payee did not exist. Codefendant Francis Reddall, Brennick's bookkeeper, helped arrange and cover up the fraud, while others, including petitioner, played various roles in transporting and depositing the checks and syphoning off the proceeds.[2]

[1]After the jury verdicts were returned, the court entered a judgment of acquittal on one of the two substantive counts on which petitioner had been found guilty on the ground that the concurrent transportation of two checks amounted to only a single substantive offense (see Pet. App. 2, n. 1).

[2]Reddall and Carl Bannon were convicted with petitioner on all counts. See *United States* v. *Reddall*, C.A. 1, No. 76-1023, decided August 31, 1976, pending on petition for writ of certiorari, No. 76-5509; *United States* v. *Bannon*, C.A. 1, No. 76-1024, decided November 15, 1976. Bannon testified for the government at petitioner's trial after receiving a grant of immunity. Edward Street was tried separately and convicted on all counts in an earlier trial. See *United States* v. *Street*, C.A. 1, No. 75-1483, decided July 1, 1976, certiorari denied, No. 76-70, October 12, 1976. Jerome Cowden was tried separately in another trial and was also convicted on all counts. See *United States* v. *Cowden*, C.A. 1, No. 76-1025, decided November 16, 1976, pending on petition for writ of certiorari, No. 76-5800.

ARGUMENT

Petitioner claims that the district court's charge to the jury was erroneous. Specifically, he contends that the instructions permitted the jury to conclude that the two checks specified in the indictment were "falsely made, forged, or counterfeited" simply by finding that the endorsements on the backs of the checks were forgeries, but that a forged endorsement does not constitute a violation of Section 2314. Petitioner objects to the following portion of the charge (5 Tr. 226-227):

> If [the government] has satisfied you beyond a reasonable doubt that there was no Jacob Weiner known to Mr. Brennick and that Mr. Brennick had no business with anyone named Jacob Weiner, if you are satisfied that has been proved beyond a reasonable doubt, then you could find that the signature of Jacob Weiner was put on there by some unknown party and that it was for that reason a forgery.
>
> Now, on that question you have (a) the testimony of Mr. Brennick himself, who testified that he didn't sign the check; (b) that he didn't authorize anyone else to sign his name on it and (c) that he didn't know anybody named Jacob Weiner. That is the way I remember it. It is for you people to decide what Brennick's testimony was.
>
> If you believe Brennick's testimony that he had no business dealings with anybody named Jacob Weiner, you can find that the check is a falsely made check. Even though, in fact, there may be some people some place in the United States who have the name Jacob Weiner, he would be a fictitious person as far as Mr. Brennick is concerned, if you believe Brennick's testimony he never had any business with him and never intended to pay him.

Petitioner did not object to this portion of the charge when it was given, and he therefore must demonstrate not only that it was erroneous but also that it constituted plain error affecting substantial rights. See Rules 30 and 52(b), Fed. R. Crim. P. We submit that, "viewed in the context of the overall charge" and "as part of the whole trial" (*United States* v. *Park*, 421 U.S. 658, 674), the charge was essentially correct and that, in any event, it did not constitute plain error.

1. It is important to note at the outset that the principal issue at trial was not whether the checks specified in the indictment were "falsely made, forged, or counterfeited," but whether petitioner, an attorney, knowingly participated in the scheme to defraud Brennick (5 Tr. 138-151). Indeed, none of the defendants' counsel suggested in their summations that the checks were in fact genuine or that they had been signed by or with the authority of Brennick. On the contrary, there was undisputed expert testimony that the signature on the face of the checks had been traced from Brennick's actual signature (2 Tr. 24-40), and Brennick himself testified that he had not authorized anyone to use his signature on a check, that he did not know anyone named "Jacob Weiner," that he had not intended to pay any money to anyone with that name, and that he had not seen the checks specified in the indictment until after they had been deposited and drawn upon by the defendants (1 Tr. 109-110). Petitioner's failure to object at trial to the portion of the judge's charge of which he now complains further underscores the absence of serious dispute regarding the fraudulent nature of the checks.

2. In any event, petitioner was not prejudiced by the court's charge to the jury. Contrary to petitioner's contentions, the trial judge carefully instructed the jury on the essential elements of the crime and emphasized

that each element had to be proven beyond a reasonable doubt.[3] The jury was required to find (5 Tr. 224):

> First, that the check involved * * * was a falsely made or forged or counterfeited check; secondly, that each defendant knew that the check was falsely made or forged or counterfeited; thirdly, that each defendant transported or caused the transportation of that check from Massachusetts to New York; and fourth, that each defendant did so knowingly, willingly, and with a fraudulent intent.

The court then gave a detailed explanation of what had to be proven with regard to each element (5 Tr. 225-232). As to the first element, the jury was charged that there were three alternative ways of establishing that the checks were falsely made or forged: the government could show that (1) neither Brennick nor anyone acting with his permission had signed the checks; (2) the checks themselves were not genuine but were rather an imitation by some unknown party; or (3) no Jacob Weiner ever existed and his name had been endorsed by someone else (5 Tr. 225-227).

Although petitioner asserts (Pet. 6-7) that the third alternative theory was erroneous, since it permitted the jury to find, contrary to *Streett* v. *United States*, 331 F. 2d 151 (C.A. 8), and other cases, that Section 2314 was violated solely because of a forged endorsement, the court of appeals properly rejected this argument.

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[3]This case is thus unlike *Screws* v. *United States*, 325 U.S. 91, and other decisions on which petitioner relies (Pet. 8), in which the jury was not charged at all or was charged wholly incorrectly about an essential element of the crime. Because, in such cases, it is impossible for the jury to have reached a proper verdict, the courts have recognized the error even in the absence of an objection.

Even assuming that *Streett* was correctly decided,[4] there is virtually no likelihood on this record that the jury's verdict rested entirely upon its conclusion that Weiner's signature on the check was forged.

The evidence at trial that Brennick had neither signed nor authorized the checks was compelling. An F.B.I. document examiner, whose testimony petitioner has conceded was "unassailable" (P. Br. 42),[5] stated that Brennick's signature on the two suspect checks had been traced from a model and that the check forms had also been copied, presumably from genuine Brennick checks, by means of an offset printing process (2 Tr. 24-30, 36-44). Moreover, as noted above, Brennick testified that he did not know anyone named Jacob Weiner and had never issued or authorized the issuance of the checks specified in the indictment. As the court of appeals noted in rejecting a claim of co-conspirator Cowden identical to that now presented by petitioner, "[i]f this evidence * * * is accepted, and there was no contrary evidence, the first two alternative theories [submitted to the jury] would be dispositive; and it is scarcely clear in what respect the technical deficiencies now alleged in the third theory of the instruction would be relevant." *United States* v. *Cowden*, *supra*, slip op. 16.

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[4]In *Streett*, a concededly genuine traveler's check with an authentic signature was stolen and the countersignature necessary to cash the check was forged. The court of appeals held that Section 2314 did not prohibit the interstate transportation of such an instrument, since the statute covered forged securities rather than forged endorsements. Here, by contrast, neither the checks nor the signature of the maker was genuine. We also note that, as a result of *Streett*, Congress amended Section 2314 in 1968 to prohibit the interstate transportation of a traveler's check bearing a forged countersignature. 82 Stat. 885.

[5]"P. Br." refers to petitioner's brief in the court of appeals.

Thus, even if the jurors may have found that Weiner was a fictitious person and that the endorsements on the checks were forgeries, they unquestionably would also have concluded that Weiner's name had been inserted as a payee on the check by someone other than Brennick. Under these circumstances the jury could properly determine that the checks were falsely and fraudulently made, in violation of Section 2314. See *Gearing* v. *United States*, 432 F. 2d 1038, 1041 (C.A. 5), certiorari denied, 401 U.S. 980; *United States* v. *Di Pietto*, 396 F. 2d 283, 286-287 (C.A. 7), vacated on other grounds, 394 U.S. 310, reaffirmed on remand *sub nom. United States* v. *Mirro*, 435 F. 2d 839; *Hall* v. *United States*, 372 F. 2d 603, 611 (C.A. 8), certiorari denied, 387 U.S. 923.

The time for petitioner to have raised objections to the court's instructions was before the jury retired. In light of the evidence at trial concerning Brennick's signature and the check forms, there is nothing to petitioner's claim "that a correct charge would have led the jury to acquit" (Pet. 10). His attack on the instructions to the jury was therefore correctly rejected by the court of appeals. Fed. R. Crim. P. 52(b).[6]

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[6]Although petitioner asserts (Pet. 11) that, but for the court's instructions, the jury might have believed that Brennick had been involved in the fraudulent scheme, there was absolutely no evidence at trial that Brennick had signed the checks or that he had benefitted in any way from the fraud, and no instruction related to petitioner's theory was requested or given. Similarly, Section 3-405 of the Uniform Commercial Code is inapposite. That section provides that an endorsement on a check is effective even "if * * * a person signing as or on behalf of a member or drawer intends the payee to have no interest in the instrument." Again, however, there was no evidence from which the jury could have concluded that Brennick had actually made out the two checks to a fictitious payee and then delivered the checks to an actual person who was authorized to endorse them in the name of the payee. Moreover, as petitioner concedes (Pet. 7, n. 2) Section 3-405 "is not intended to affect criminal liability for forgery or any other crimes." The jury's verdict necessarily found that petitioner and his confederates acted "with the purpose of disobeying or disregarding the law * * * for the purpose of cheating or deceiving someone * * * " (5 Tr. 231).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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